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Since the Supreme Court found that access to abortion is a constitutional right in *Roe v. Wade*, the debate around abortion moved to the streets, particularly around the actual facilities that offer abortions.[2] Some of those protests have been peaceful, others have taken a tragic turn for the worst, resulting in injuries and death.[3] In response, courts imposed injunctions aimed at the most unruly protestors and legislatures passed laws limiting the ability to protest within a certain distance of an abortion clinic and its patients.[4] In

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[2] *See* 410 U.S. 113 (1973); *Violence at Abortion Clinics*, USA TODAY Jan. 30, 1998, at 10A (summarizing major incidents of violence directed at abortion clinics and staff); Khushbu Shah, *The 'Escorts' Who Ward Off Anti-Abortion Protesters at Mississippi's Lone Clinic*, THE GUARDIAN, Aug. 13, 2019, https://www.theguardian.com/world/2019/aug/13/mississippi-lone-abortion-clinic; Kim Chandler, *Protesters Emboldened, Patients Confused at Abortion Clinics After Slew of States Pass Restrictive Laws*, CHI. TRIBUNE, May 21, 2019, https://www.chicagotribune.com/nation-world/ct-new-state-abortion-laws-confusion-20190521-story.html.

[3] Rick Bragg, *Bomb Kills Guard at an Alabama Abortion Clinic*, N.Y. TIMES, Jan. 30, 1998, at A1.

[4] *See e.g.* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 757-60 (1994); Hill v. Colorado, 530 U.S. 703, 707 (2000).

2009, the City of Chicago enacted an ordinance that created an eight-foot exclusion zone around the patient, when within fifty feet of an entrance to a healthcare facility.[5] And in February 2019, the Seventh Circuit upheld the Chicago ordinance.[6] The court found that the ordinance was content neutral and narrowly tailored to achieve a significant governmental interest, relying on a nineteen-year-old Supreme Court precedent in *Hill v. Colorado* that upheld a nearly identical regulation.[7]

While the Seventh Circuit quickly resolved the challenge in *Price v. City of Chicago*, it spent the next twenty pages questioning today's validity of that precedent.[8] As a result, while the ordinance is in effect in Chicago, the Supreme Court is also reviewing the pending petition for writ of certiorari.[9] If the Court grants certiorari in this case, it could be used as a vehicle to strike down the precedent upholding abortion clinic bubble zone regulations. It could also be an opportunity for the Court to provide some clarity on the intersection of the First Amendment's protections for free speech with the Fourteenth Amendment's fundamental right to privacy, including the right to access abortion.

The tension between the First and Fourteenth Amendments is especially visible in the context of anti-abortion protests. In response to this tension, courts imposed injunctions and legislatures passed laws limiting speech outside of reproductive healthcare facilities. Those injunctions and statutes have two common elements, referred to here as buffer zone and bubble zone. Buffer zone refers to an exclusion area within a certain number of feet of an entrance to an abortion clinic, which prohibits anyone from standing within that exclusion zone. Bubble zone refers to a floating exclusion zone around a patient

[5] Price v. City of Chicago, 915 F.3d 1107, 1109 (7th Cir. 2019).

[6] *Id*.

[7] *Id.* at 1119; 530 U.S. 703.

[8] *Id.* at 1118-19.

[9] SCOTUSBLOG, *Price v. City of Chicago, Illinois*, https://www.scotusblog.com/case-files/cases/price-v-city-of-chicago-illinois/ (last visited Dec. 6, 2019).

entering or leaving the clinic, which prohibits others from approaching within a certain radius of that patient, for the purpose of protesting their choice.

While these laws are clearly aimed at suppressing anti-abortion protests in public places, the Supreme Court has deemed buffer and bubble zones to be content neutral.[10] As content neutral regulations they are subject to intermediate scrutiny, which requires that they be narrowly tailored toward a significant state interest.[11] If the Court found these regulations to be content based, meaning that they regulate the speech based on its content, then they would have to survive strict scrutiny—a very high standard which requires that the laws be narrowly tailored toward a *compelling* governmental interest.[12]

How did the Court then find that these laws, which are explicitly aimed at suppressing anti-abortion speech in public places, are content neutral? The Court did so by applying a content neutrality test that is different from the traditional test which it has consistently applied in other contexts.[13] The Court's desire to find bubble and buffer zones to be content neutral caused it to depart from its traditional analysis, in order to apply a lower constitutional scrutiny, thereby assuring that at least some buffer and bubble zones survive the constitutional challenge. But nearly twenty years after *Hill*, its rationale cannot withstand the test of time. Subsequent Supreme Court decisions, both in the context of abortion and non-abortion speech, directly undercut the very reasoning the Court used to deem bubble and buffer zones content neutral.[14]

As the Seventh Circuit correctly pointed out in *Price*, the Court's ruling in *Hill* is flawed and cannot be reconciled today.[15] However, it remains binding precedent. This article will discuss why the Court's content based analysis in *Hill* is flawed and why the Court should

[10] *See Hill*, 530 U.S. at 719; McCullen v. Coakley, 573 U.S. 464, 497 (2014).

[11] *McCullen*, 573 U.S. at 477.

[12] *Id.* at 478.

[13] *See infra* Part IV.

[14] *See infra* Part III.

[15] *See Price*, 915 F.3d at 1117.

correct it. Part I of this article discusses the evolution of bubble and buffer zones and its treatment by the Court. Part II discusses the Seventh Circuit's decision in *Price*. Part III explores the tensions that the Seventh Circuit noted between *Hill* and its subsequent First Amendment jurisprudence. And Part IV explains why buffer and bubble zone regulations are content based and thus should be subject to the highest level of constitutional scrutiny, strict scrutiny. Part IV also explains how the regulations can, with slight modifications, survive strict scrutiny.

REVIEW OF SUPREME COURT BUBBLE AND BUFFER ZONE PRECEDENT

Madsen v. Women's Health Center

In 1993, a Florida state court entered a permanent injunction against local abortion protestors.[16] The injunction contained, amongst other things, two specific prohibitions. First, the protestors could not approach within thirty-six feet of a specific abortion clinic's entrance (the buffer zone).[17] Second, the protestors were prohibited from "physically approaching" patients of the clinic within 300 feet of that clinic (the bubble zone).[18] The injunction was challenged in the state and federal courts. The state appellate court and the Florida Supreme Court affirmed the injunction.[19] But the United States Court of Appeals for the Eleventh Circuit struck down the injunction as an improper regulation of the content of speech, in violation of the First Amendment.[20] The United States Supreme Court granted certiorari to

[16] *Madsen*, 512 U.S. at 757-60.

[17] *Id.* at 760-61.

[18] *Id.*

[19] *Id.* at 761.

[20] Cheffer v. McGregor, 6 F.3d 705, 712 (11th Cir. 1993), *reh'g en banc granted, opinion vacated*, 41 F.3d 1421 (11th Cir. 1994), and *on reh'g en banc*, 41 F.3d 1422 (11th Cir. 1994).

the Eleventh Circuit and upheld in part and struck down in part the injunction.[21]

In reviewing the constitutionality of the two provisions of the injunction, the Court first had to decide what level of scrutiny applied to the injunctions.[22] Traditionally, laws limiting protected speech are subject to the highest scrutiny—strict scrutiny.[23] However, the Court carved out an exception for content neutral regulations of time, manner, and place of speech.[24] Therefore, if a regulation is aimed at the time, manner or place of speech, not the content thereof, then it is subject to lower scrutiny.[25] Conversely, if a regulation limits speech based on its content, then it is subject to strict scrutiny.[26]

The Court found that both of the provisions of the injunction were content neutral.[27] Citing to *Ward v. Rock Against Racism*, the Court explained that the "principal inquiry in determining content neutrality is whether the government adopted a regulation of speech without reference to the content of that speech."[28] Here, the Court found that because the injunctions do not reference the content of the speech, they are content neutral.[29] However, the Court recognized that while content neutral, these are injunctions, which pose a greater risk of censorship than generally applicable laws.[30] Therefore, the Court applied a more "stringent application" of intermediate scrutiny, asking "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."[31]

[21] *Madsen*, 512 U.S. at 757.
[22] *Id.* at 763.
[23] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015).
[24] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).
[25] *Id*.
[26] *Reed*, 135 S. Ct. at 2226.
[27] *Madsen*, 512 U.S. at 762.
[28] *Id.* at 763 (quotation marks omitted).
[29] *Id.* at 762.
[30] *Id.* at 764-65.
[31] *Id.* at 765.

Applying this more "stringent" test, the Court found that the thirty-six-foot fixed buffer zone was valid, but the 300-foot bubble zone was not.[32] The Court found that the thirty-six-foot fixed buffer zone did not burden more speech than was necessary because the governmental interest—providing safety and accessibility to the clinic—justified the limited burden on speech in that limited area.[33] However, the 300-foot no approach zone, in the Court's view, burdened speech in too large of an area while pursuing a less compelling governmental interest—preventing "clinic patients and staff from being stalked or shadowed by the petitioners."[34] Citing to *Boos v. Barry*, the Court explained that "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment."[35]

In so holding, the Court constructed the first principles for abortion clinic bubble and buffer zones, finding them to be content neutral and thus subject to intermediate scrutiny. At the same time, the Court recognized the importance of unrestricted speech, especially in a public forum, thereby justifying the use of a more "stringent" application of intermediate scrutiny. The Court also showed that there exists a positive relationship between the size of the restriction and the governmental interest pursued. Thus, to be valid, the larger the radius, the more compelling the interest has to be. Finally, *Madsen* also drew the first line between a permissible limitation of speech—a fixed thirty-six-foot buffer zone—and an impermissible one—a 300-foot no approach bubble zone.

Schenck v. Pro-Choice Network of Western New York

The next abortion buffer zone case to arrive at the Supreme Court was *Schenck v. Pro-Choice Network of Western New York* which

[32] *Id.* at 769-70, 773-74.

[33] *Id.* at 769-70.

[34] *Id.* at 773-74 (quotations omitted).

[35] *Id.* at 774 (citing Boos v. Barry, 485 U.S. 312, 321 (1988)).

involved another injunction.[36] This time the lower court prohibited the petitioners, abortion protestors, from approaching within fifteen feet of any entrance to an abortion clinic (the buffer zone) and within fifteen feet of any patient entering or leaving that clinic (the bubble zone).[37] As the protestors appealed that injunction, the Supreme Court decided *Madsen*, and the Court of Appeals for the Second Circuit relied explicitly on the Supreme Court's reasoning in *Madsen* to affirm the injunction.[38] The Supreme Court granted certiorari and affirmed in part and reversed in part.[39]

The Court found that the fifteen-foot fixed buffer zone around the entrance survived constitutional scrutiny, but the fifteen-foot floating buffer zone around patients did not.[40] The Court began by noting that *Madsen* found similar injunctions to be content neutral and as such, the Court did not discuss content neutrality here, but rather launched straight into the *Madsen* intermediate scrutiny analysis.[41] The Court also noted that the governmental interests at play—public safety, unrestricted access to clinics, and free-flow of traffic—are the same as in *Madsen* and thus valid.[42]

First, the Court turned to the floating bubble zone, which prohibited petitioners from approaching within fifteen feet of the clinic's patients.[43] The Court noted because this buffer zone floated with the patient, it required the protestors to move as the patient moved in order to avoid being within the buffer zone.[44] The Court also found it important that this provision impacted leafletting and commenting on matters of public concern, which are the "classic

[36] 519 U.S. 357 (1997).
[37] *Id.* at 367.
[38] *Id.* at 370-71.
[39] *Id.* at 385.
[40] *Id.* at 376-77.
[41] *Id.* at 374-85.
[42] *Id.* at 376.
[43] *Id.* at 377.
[44] *Id.* at 377-78.

forms of speech that lie at the heart of the First Amendment . . . ."[45] The Court concluded that "because this broad prohibition on speech 'floats,' it cannot be sustained on this record."[46] But, the Court also noted that it was not deciding "whether the governmental interests involved would ever justify some sort of zone of separation between individuals entering the clinics and protesters, measured by the distance between the two."[47]

Turning to the fixed buffer zone around the entrances to the clinic, the Court found that the buffer zone properly regulated time, manner, and place of speech, rather than its content.[48] The Court upheld the buffer zone, noting that the records showed that the protestors often intentionally blocked access to the clinic.[49] Therefore, the fixed buffer zone was squarely aimed at limiting this practice and protecting the governmental interest in safe access to the clinic.[50]

Schenck affirmed *Madsen* and provided further guidance on the intersection of the First Amendment's freedom of speech and the Fourteenth Amendment's fundamental right to access abortion. The Court solidified its prior conclusion that buffer and bubble zones are content neutral and thus subject to intermediate scrutiny (or a "more stringent" application thereof). It also reaffirmed that buffer zones, if properly tailored, likely survive this level of scrutiny even though the First Amendment rights are enhanced in the context of discourse on matters of public concern in public forum. And while *Schenck* struck down the floating buffer zone, the Court did not answer the question of whether any floating zone can survive constitutional scrutiny.

Hill v. Colorado

[45] *Id.* at 377.
[46] *Id.*
[47] *Id.*
[48] *Id.* at 380.
[49] *Id.*
[50] *Id.*

In 2000 the Court answered that question in the affirmative. Building off of its momentum from *Madsen* and *Schenck*, the Supreme Court returned to abortion clinic bubble zone regulation. This time, in *Hill v. Colorado*, the Court reviewed a Colorado statute that prohibited people, within 100-feet of a reproductive health facility, from knowingly approaching within eight-feet of a patient of the facility, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with" such a patient.[51] Abortion protesters challenged the law in state court arguing that it is facially invalid, content based regulation aimed at suppressing their free speech and press rights.[52] The trial court upheld the statute, the Colorado Court of Appeals affirmed, and the Colorado Supreme Court denied review.[53]

While the protestors' petition for writ of certiorari was pending, the Court decided *Schenck.* In light of that decision, the Court granted certiorari, vacated the judgment of the Colorado Court of Appeals, and reversed for reconsideration in light of *Schenck*.[54] On remand, the Colorado Court of Appeals reinstated its previous judgment, finding that *Schenck* did not impact its analysis.[55] The Colorado Supreme Court affirmed the Court of Appeal's finding that the law was a permissible regulation of time, manner, and place of speech which survived intermediate scrutiny.[56] The Supreme Court of the United States granted certiorari and affirmed.

Writing for the majority, Justice Stevens began the analysis by noting that the protestors clearly have a First Amendment right to free speech and the government has a legitimate interest in protecting the "health and safety of their citizens."[57] This governmental interest justifies regulations that ensure access to healthcare facilities, as well

[51] *Hill*, 530 U.S. at 707.
[52] *Id.* at 709.
[53] *Id.* at 711.
[54] *Id.* at 712.
[55] *Id.*
[56] *Id.* at 712-14.
[57] *Id.* at 714-15.

as "the avoidance of potential trauma to patients associated with confrontational protests."[58] The government also has a legitimate interest in regulations that provide specific guidance for law enforcement, thereby promoting equal enforcement.[59] And finally, the Court noted that there is another interest at play here, that of "[t]he unwilling listener's interest in avoiding unwanted communication," stemming from the "right to be let alone" recognized in *Olmstead v. United States*.[60] But, the Court noted that this "right to be let alone" is in tension with the First Amendment's "right to persuade."[61]

The Court then moved on to the content neutrality analysis. The Court explained that this inquiry asks whether the statute can be "justified without reference to the content of the regulated speech."[62] Citing *Ward*, the Court explained that when determining content neutrality, the "principal inquiry . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[63] Applying this test, the Court determined that the Colorado statute is content neutral for three reasons.[64] First, it is not a "regulation of speech," but merely a regulation of where some speech may occur.[65] Second, the statute is not motivated by a disagreement with any particular message because it applies equally to all demonstrators within the specified radius and does not refer to any content of the speech.[66] Third, the governmental interests pursued by this statute—protecting patients' access and privacy and providing

[58] *Id.* at 715 (citing *Madsen*, 512 U.S. 753).

[59] *Hill*, 530 U.S. at 715-16.

[60] *Id.* at 716 (citing Olmstead v. United States, 277 U.S. 438, 478 (1928)).

[61] *Hill*, 530 U.S. at 716 ("While the freedom to communicate is substantial, 'the right of every person "to be let alone" must be placed in the scales with the right of others to communicate.'" quoting Rowan v. Post Office Dept., 397 U.S. 728 (1970)).

[62] *Ward*, 491 U.S. at 791.

[63] *Hill*, 530 U.S. at 719 (quoting *Ward*, 491 U.S. at 791).

[64] *Id.*

[65] *Id.*

[66] *Id.*

clear guidelines to law enforcement—are unrelated to the content of the regulated speech.[67]

The protestors argued that the law is still content based because enforcement of the law will require examination of the content of the speech.[68] Since the law criminalizes approaching within eight feet of a patient, "for the purpose of . . . engaging in oral protest, education, or counseling," law enforcement must necessarily examine the content of the speech to determine if one is engaging in "protest, education or counseling," or merely saying something else, such as good morning.[69] The Court rejected this argument as being without merit.[70] First, without citing any authority, the Court explained that it is common for law enforcement to have to examine a statement in order to determine if a violation occurred—for example, a statement must be examined to decide if it is blackmail, a threat, or a copyright violation.[71] Moreover, the Court, again without citing any authority, clarified that it has never held that "it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct."[72] And finally, the Court noted that in this specific context, it is unlikely that any such examination will practically be required; rather, it will be obvious who is present outside of an abortion clinic "for the purpose of . . . engaging in oral protest, education, or counseling."[73]

Since the Court found that the statute is content neutral, intermediate scrutiny applies and the law must be narrowly tailored to serve a significant governmental interest.[74] The Court began by accounting for the burden imposed by the statute on the three types of

[67] *Id.* at 719-20.
[68] *Id.* at 720.
[69] *Id.*
[70] *Id.* at 721.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Ward*, 491 U.S. at 791.

regulated speech: signs, oral protest, and leafletting.[75] The law imposed minimum to no burden on signs displayed by protestors because they can be read from eight feet away.[76] As for oral protests, the Court also found that eight feet is not burdensome because eight feet is a "normal conversational distance."[77] However, for leafletting, the Court conceded that the law imposed a "more serious" burden, but still does not completely foreclose this form of communication. In an apparent nod to *Schenck*, the Court noted that the statute does not require someone who is already in the path of an incoming patient to get out of the way.[78] Thus, such a protestor may stand anywhere within the 100-foot radius and may remain stationary even if that means that at some point she will be within the eight-foot floating bubble of a patient. [79] The statue only prohibits protestors from knowingly *approaching* within eight feet of a patient.[80]

Noting the burden of the law, the Court explained that when deciding tailoring, context is important because courts recognize heightened governmental interest in certain places, such as schools, courthouses, polling places, private homes, and healthcare facilities.[81] And since the Colorado statute regulates speech around a healthcare facility—a place where the governmental interest is heightened—the law is an "exceedingly modest restriction."[82] Thus, the law survives constitutional scrutiny because it is narrowly tailored to serve a significant interest.[83]

The protestors also argued the law is invalid because it is overbroad and vague.[84] The law is overbroad because it aims to

[75] *Hill*, 530 U.S. at 726.
[76] *Id.*
[77] *Id.* at 726-27 (quoting *Schenck*, 519 U.S. 357).
[78] *Hill*, 530 U.S. at 727.
[79] *Id.*
[80] *Id.*
[81] *Id.* at 728.
[82] *Id.* at 729.
[83] *Id.*
[84] *Id.* at 730-33.

prevent a very specific problem—protests outside of abortion clinics—but it applies to all healthcare facilities and bans all types of speech.[85] The Court dismissed the first part of the argument on the grounds that the statute's far reach to all healthcare facilities is a "virtue, not a vice," because it supports its content neutrality resulting in intermediate, rather than strict, scrutiny.[86] As to the argument that the statute bans too much speech, the Court explained that this is a misreading of the law because it does not "ban" any speech; rather it regulates certain speech in certain places.[87] With regard to vagueness, the Court quickly dismissed this concern, holding that "it is clear what the ordinance as a whole prohibits."[88]

In a 6-3 decision, the Court upheld the Colorado statute, finding it to be a content neutral regulation which is narrowly tailored to address a significant governmental interest.[89] Again, building off of *Madsen* and *Schenck*, the Court confirmed its view that abortion clinic buffer zones are content neutral. *Hill* also provided some much-needed clarification on the tailoring requirement. Thus, while a fifteen-foot floating bubble that required protestors to get out of the patient's way placed too much burden on speech,[90] an eight-foot floating bubble zone that did not require protestors to get out of the way did not. Likewise, a 300-foot radius is too large, but a 100-foot radius is not.

McCullen v. Oakley

Fourteen years after *Hill*, the Supreme Court agreed to review *McCullen v. Oakley*, which was another challenge to an abortion clinic buffer zone.[91] This time, at issue was a Massachusetts law which

[85] *Id.* at 730.

[86] *Id.* at 731.

[87] *Id.*

[88] *Id.* at 731-32 (quoting Grayned v. City of Rockford, 408 U.S. 104, 110 (1972)).

[89] *Hill*, 530 U.S. at 725, 730.

[90] *See Schenck*, 519 U.S. at 377.

[91] McCullen v. Coakley, 573 U.S. 464 (2014).

created a fixed buffer zones on public walkways within thirty-five feet of any entrance to a "reproductive health care facility."[92] A reproductive health care facility was defined as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed."[93] The law, in effect, made it a crime to stand anywhere within thirty-five feet of an abortion clinic during business hours.[94] In practice, the law lead clinics to paint an arc on the sidewalk outlining the thirty-five foot radius.[95] The law also exempted four classes of people: 1) people entering or leaving the clinic; 2) employees or agents, acting within the scope of their employment; 3) law enforcement and other emergency services members; and 4) people walking on a public sidewalk "solely for the purpose of reaching a destination other than such facility."[96] The law was enacted as a means to replace the prior regulation which created a six-foot floating bubble within eighteen feet of a healthcare facility.[97]

The plaintiffs, abortion protestors who call themselves "sidewalk counselors," challenged the new law, arguing that it violated the First and Fourteenth Amendments on its face and as applied.[98] After a bench trial, the district court denied the plaintiffs' facial challenge, and the First Circuit affirmed.[99] On remand, the court also denied the as-applied challenge, and the First Circuit again affirmed.[100] The Supreme Court granted certiorari, ultimately striking down the law.[101]

Writing for the majority, Justice Roberts began by noting that the law explicitly applies to anyone who enters or remains on a "public

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[92] MASS. GEN. LAWS, CH. 266, § 120E1/2(b) (2012).

[93] *Id.* § 120E1/2(a).

[94] *McCullen*, 573 U.S. at 472.

[95] *Id.*

[96] MASS. GEN. LAWS, CH. 266, § 120E1/2(b); *see also McCullen*, 573 U.S. at 472.

[97] *McCullen*, 573 U.S. at 469-70.

[98] *Id.* at 475.

[99] *Id.*

[100] *Id.* at 472.

[101] *Id.* at 497.

way or sidewalk," a place known as traditional public fora and which occupies a special place within the First Amendment jurisprudence.[102] Again, the Court began by determining if the law was content based.[103] The plaintiffs advanced two arguments for why it was.[104] First, it was content based because it applied only to health care facilities that perform abortions, thus it targeted speech related to abortions.[105] Second, it was content based because by excluding clinic employees, the law discriminated based on viewpoint.[106]

The Court rejected the first argument because the law is facially neutral. Surely, the Court explained, the law "would be content based if it required enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred."[107] However, here, no such need exists because violation is not based on what is said, but where it is said, or not said at all, since the act can be violated by merely standing within the buffer zone without speaking.[108]

The Court conceded that the law has an inevitable effect of limiting abortion-related speech more than any other kind of speech.[109] But, under *Ward*, the test for content neutrality is whether the law is "justified without reference to the content of the regulated speech," not whether it burdens one type of speech more than another.[110] And here, the legislature's intent was to create a new law that would more effectively promote public safety around abortion clinics, an interest that the Court previously found to be content neutral.[111] However,

[102] *Id.* at 476.

[103] *Id.* at 477, 485.

[104] *Id.* at 478.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 479 (quoting FCC v. League of Women Voters of Cal., 468 U.S. 364, 383 (1984)).

[108] *McCullen*, 573 U.S. at 479-80.

[109] *Id.* at 480.

[110] *Ward*, 491 U.S. at 791.

[111] *McCullen*, 573 U.S. at 480-81 (citing *Boos*, 485 U.S. at 321).

Justice Roberts noted that the law would not be content neutral if "it were concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or '[l]isteners' reactions to speech.'"[112] Finally the Court explained that it will not find an ill-motive for the law because the law applies to abortion clinics only. [113] The State was merely responding to the problem it observed—crowding and obstruction of access to abortion clinics—and no similar problem existed with regard to other healthcare facilities in the State.[114]

The Court also rejected the second argument, that the law is content based because it exempts employees.[115] The plaintiffs argued that by exempting employees, the law allows employees—who will likely speak favorably of abortion—to speak within the buffer zone, while it prohibits others—who will likely speak against abortion—from speaking in the same place.[116] Thus, in effect, the law discriminates based on abortion viewpoint.[117] The court rejected this argument, viewing the employee exception as reasonable and logical to ensure smooth operation of the clinic.[118] Indeed, because the exemption applies only to employees who are acting in the scope of their employment, it suggests that this is merely an exemption necessary for the day-to-day operations of the facility, rather than an insidious carve out to promote one side of a public debate.[119] As such, the Court found the law to be a content neutral regulation of the time, manner, and place of speech.

However, the Court struck down the law for not being narrowly tailored to serve a significant governmental interest.[120] The Court

[112] *Id.*
[113] *Id.* at 481.
[114] *Id.* at 482.
[115] *Id.* at 482-85.
[116] *Id.* at 482-83.
[117] *Id.*
[118] *Id.* at 483-84.
[119] *Id.*
[120] *Id.* at 490.

agreed that the State has a valid interest in promoting "public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways."[121] And while the law served those interests, it also imposed significant burdens on the plaintiffs who wished to engage in sidewalk counseling, including one-on-one conversations and leafletting, activities which are fundamental to the First Amendment.[122]

Weighing the State's interests in ensuring public safety and access to abortion clinics against the significant burden imposed on plaintiffs' protected speech, the Court concluded that the law burdens more speech than necessary.[123] First, while other states and municipalities regulate access to health care facilities (for example Colorado), no other jurisdiction has a statute creating a hard, fixed buffer zone around the clinic.[124] This means that the State has forgone other, less restrictive alternatives.[125] Second, the law was redundant because another provision of the same act already criminalized obstruction of access to a healthcare clinic, and other state laws regulated public access to clinics.[126] Third, the Court noted that it prefers direct injunctions against protestors who actually obstruct access over a blanket exclusionary buffer zone that impacts even the peaceful protestors.[127] Fourth, while the record shows that the State was concerned with protecting access to abortion clinics, access was only restricted or obstructed at one clinic, and only on Saturday mornings, but the law applied to all clinics, at all times.[128]

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[121] *Id.* at 486.

[122] *Id.* at 487-89.

[123] *Id.* at 490.

[124] While the Court has previously upheld fixed buffer zones in *Schenck* and *Madsen*, those cases involved injunctions, as opposed to generally applicable statutes. Indeed, in those cases the Court relied on the fact that the challenged buffer zones were injunctions and thus presumably more tailored than generally applicable laws would be. *See Schenck*, 519 U.S. at 380.

[125] *McCullen*, 573 U.S. at 490.

[126] *Id.* at 490-91.

[127] *Id.* at 492.

[128] *Id.* at 493.

Returning to this subject after fourteen years, the Supreme Court again signaled that abortion clinic buffer zones are content neutral. But *McCullen* added two significant holdings. First, Justice Roberts explained that the law would be content based if the content of the speech had to be examined to determine a violation of the law. Second, the law would also be content based if it were concerned with the effect of the speech on its listeners. Both points undermine *Hill* which dismissed the concern over the need to examine content as being of no consequence and which assumed that protecting listeners from unwanted speech was a valid governmental interest. Additionally, *McCullen* also signaled that buffer zones created by generally applicable laws, as opposed to injunctions, are disfavored and usually a result of forgoing other, less restrictive alternatives.

Reed v. Town of Gilbert

The last case pertinent to this discussion, although not explicitly related to buffer or bubble zones, is a 2015 decision striking down a local ordinance that classified signs in Gilbert, Arizona.[129] In 2005, the town of Gilbert adopted the Sign Code (the "Code"), which classified signs that were allowed to be displayed in the city into different categories, based on the information they conveyed, and applied varying restrictions to each category.[130] Three specific categories were at issue in *Reed*: ideological signs, political signs, and temporary directional signs.[131] Ideological signs were defined as signs for noncommercial purpose and were subject to the least restrictions.[132] Political signs were defined as signs designed to influence an election and were subject to more restrictions than ideological signs.[133] And temporary directional signs, which were defined as signs directing

[129] Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015).
[130] *Id.* at 2224.
[131] *Id.*
[132] *Id.*
[133] *Id.* at 2224-25.

people to an event, were subject to the most restrictions.[134] Plaintiff, a local church pastor, posted signs directing people to his Sunday church service, but after the Code was enacted, his signs were not in compliance with the restrictions imposed on temporary directional signs.[135] Plaintiff sued, alleging that the Code violated the First and Fourteenth Amendments.[136] The trial court denied the challenge and the Ninth Circuit affirmed, finding that under *Hill*, the Code is content neutral and narrowly tailored to serve a significant governmental interest.[137]

The Supreme Court reversed, finding that the Code was content based and failed strict scrutiny.[138] The Court began by noting that there are three types of content based laws.[139] First, there are the facially content based laws, which define speech based on its content.[140] Second, there are the more subtle laws, which define speech by its function or purpose.[141] Finally, there is also a third category of content based laws which arises out of *Ward*.[142] These are facially content neutral laws that cannot be justified without reference to the content of the speech.[143] Proper content neutrality analysis, as Justice Thomas explained, tests the law at issue under all three categories.[144] Applying the test to the Code, the Court found it to be content based on its face because it classified the signs based on the information conveyed.[145]

[134] *Id.* at 2225.
[135] *Id.* at 2225-26.
[136] *Id.*
[137] *Id.* at 2226.
[138] *Id.* at 2231-32.
[139] *Id.* at 2227.
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.*

The Court next explained how the Ninth Circuit erred in finding that the Code was content neutral.[146] First, the lower court found the law to be content neutral because it can be justified without reference to its content.[147] But this is not important here because the law is content based on its face.[148] The Court explained that applying the *Ward* test for content neutrality skips the first two steps in the analysis: determining if the law is content based on its face or by its function.[149] The *Ward* test only applies in the third category of regulation, where the law is not content based on its face and does not regulate speech based on its function or purpose.[150] Here, the Code is content based on its face, thus there is no need to even apply the *Ward* content neutrality test.[151]

The Ninth Circuit also found that the law was content neutral because it did not single out any one idea for favorable treatment.[152] But, the Court explained, this rationale confuses two First Amendment prohibitions.[153] The First Amendment prohibits viewpoint discrimination *as well as* subject matter discrimination.[154] Therefore, strict scrutiny is triggered when a law discriminates among viewpoints or subject matters.[155] Here, while the law did not single out any one viewpoint, it regulated an entire subject matter.[156]

Having determined that the Code was content based, the Court applied strict scrutiny, which requires that the law be narrowly tailored to meet a compelling governmental interest.[157] The town of Gilbert

[146] *Id.*
[147] *Id.* at 2228.
[148] *Id.*
[149] *Id.*
[150] *Id.* at 2228-29.
[151] *Id.* at 2227.
[152] *Id.* at 2229.
[153] *Id.* at 2230.
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.* at 2231.

presented two interests it was pursuing: preserving the town's aesthetic appeal and traffic safety.[158] Without commenting on whether these interests are compelling, the Court concluded that the Code fails strict scrutiny because it is underinclusive.[159] This is because directional signs—which are burdened with the most restrictive regulations—are no more of an eye sore or pose any greater traffic safety concerns than ideological or political signs, both of which are subject to lesser restrictions.[160]

Reed provides the last piece of the puzzle. While the context is different in *Reed* than in the other abortion clinic bubble and buffer zone cases, *Reed* clarified the *Ward* content based analysis. Specifically, the Court explained that there are three separate types of content based regulation, and the law at issue must be evaluated under each of the three types.[161] In prior cases the Court only focused on *Ward*'s "justified without reference to the content" type. But *Reed* makes clear that this is only one of the three possible types of content based regulation, and failure to test the law under the other two types is fatal to the analysis.

Price v. City of Chicago

In 2009, the City of Chicago passed an ordinance creating a fifty-foot radius around the entrance of a hospital, medical clinic, or healthcare facility.[162] Within that radius, people are prohibited from approaching within eight feet of another person, without consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling." (the "Chicago Ordinance").[163] The Chicago Ordinance mirrored the Colorado statute upheld in *Hill*, except that the latter applied within a 100-foot radius of

[158] *Id.*
[159] *Id.*
[160] *Id.* at 2230-31.
[161] *Id.* at 2227.
[162] CHI., ILL., CODE § 8-4-010(j)(1).
[163] *Id.*

a facility, whereas the former applies to a narrower, fifty-foot radius.[164] In 2016, Veronica Price, and other pro-life "sidewalk counselors," sued the City of Chicago challenging the Chicago Ordinance.[165] The four-count complaint alleged that the Chicago Ordinance: (1) violated the First Amendment, facially and as applied, by improperly restricting their protected speech; (2) was unconstitutionally vague, in violation of the Due Process Clause of the Fourteenth Amendment; (3) was selectively enforced in violation of the Equal Protection Clause of the Fourteenth Amendment; and (4) improperly infringed the petitioners' state rights to free speech and assembly.[166] The City moved to dismiss the complaint for failure to state a cause of action, which, relying on *Hill*, the District Court granted as to the First Amendment and vagueness claims, but denied as to the as applied challenge under the First Amendment, the selective enforcement claim, and the state law claims.[167] The parties jointly moved to dismiss the remaining claims, allowing Price to appeal the ruling on the facial challenge.[168]

The Seventh Circuit affirmed the District Court's dismissal.[169] The court explained that because the Ordinance mirrored, and indeed was narrower than, the statute upheld in *Hill*, it was bound by the Court's precedent.[170] However, the Seventh Circuit noted that while the law must be upheld under *Hill*, in the nineteen years since that decision, the Court's First Amendment jurisprudence, specifically, *McCullen* and *Reed*, significantly eroded the basic assumptions and conclusions in *Hill*.[171] And although the court affirmed the dismissal, it went on to explain why *Hill* is of questionable authority.[172]

[164] *Price*, 915 F.3d at1110.
[165] *Id.* at 1109.
[166] *Id.* at 1110.
[167] *Id.*
[168] *Id.*
[169] *Id.* at 1119.
[170] *Id.* at 1111.
[171] *Id.* at 1117.
[172] *Id.* at 1110-19.

TENSION BETWEEN *HILL*, *MCCULLEN*, AND *REED*

Judge Sykes, of the Seventh Circuit, began the analysis in *Price v. City of Chicago* by noting the force of the First Amendment in public fora.[173] Borrowing the phrase from Justice Roberts, the court noted that public places such as sidewalks and walkways "occupy a special position in terms of First Amendment protection because of their historic role as sites for discussion and debate."[174] Therefore, Price and other sidewalk counselors engage in counseling in the place where their First Amendment rights have the strongest protections.[175] Rounding out its introduction, the court remarked that content based laws are subject to strict scrutiny, but regulations of time, manner, and place of speech are evaluated under intermediate scrutiny.[176] But, to date, abortion clinic buffer and bubble zones have only been evaluated under intermediate scrutiny.[177]

Next, the court turned to the evolution of abortion clinic buffer and bubble zone jurisprudence.[178] The court noted that buffer and bubble zone regulations have been consistently held to be content neutral.[179] But the court noted that not all such regulations survived constitutional scrutiny; *Madsen* struck down the 300-foot buffer zone and *Schenck* struck down the fifteen-foot bubble zone.[180] The Seventh Circuit also noted that *Schenck* left open the question of "whether the governmental interests involved would ever justify some sort of zone of separation between individuals entering the clinics and protesters, measured by the distance between the two."

[173] *Id.* at 1111.
[174] *Id.*
[175] *Id.* at 1112.
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.* at 1111-13.
[180] *Id.*

Judge Sykes next reviewed *Hill*, *McCullen*, and *Reed*, providing a detailed examination of each decision, before contrasting them.[181] This is where the Seventh Circuit laid out the evolution of abortion clinic bubble and buffer zone jurisprudence and the eventual erosion of *Hill*.[182] First, the court noted that *Hill* began its content neutrality analysis by asking if the government enacted the regulation because of a disagreement with the message conveyed.[183] But, as the Seventh Circuit pointed out, *Reed* explained that the first step of the content neutrality test requires testing the statute for content neutrality on its face.[184] Indeed, in *Reed*, Justice Thomas took the time to specifically explain the three types of content based laws (facially obvious, subtle, or unjustifiable without refence to content) and in no uncertain terms clarified that courts need to test for each type before concluding that a law is content neutral.[185] *Hill* merely tested for the third type—whether the law can be justified without reference to the content of the regulated speech. Finding that the law can be so justified, the Court found it to be content neutral.[186]

The Seventh Circuit also pointed out that *Hill* did not completely ignore the statute on its face; rather, it concluded that the statute was content neutral because it did not discriminate based on viewpoint or subject matter, and the Court was not concerned about law enforcement having to evaluate content of speech to determine violations.[187] But as the Seventh Circuit correctly noted, *McCullen* and *Reed* explicitly contradict both of those points.[188] *McCullen* explained that a law *would be* content based if law enforcement had to examine the content of the message conveyed in order to determine if a

[181] *Id.* at 1113-17.
[182] *Id.* at 1117.
[183] *Hill*, 530 U.S. at 719; *Price*, 915 F.3d at 1117.
[184] *Price*, 915 F.3d at 1117.
[185] *Id.* at 1117-18.
[186] *Hill*, 530 U.S. at 719.
[187] *Price*, 915 F.3d at 1117-18.
[188] *Id.* at 1118.

violation occurred.[189] And *Reed* explained that the fact that a law does not discriminate based on viewpoint or subject matter does not absolve an otherwise facially content based law from strict scrutiny.[190]

Judge Sykes then focused on the second category of content based laws described in *Reed*.[191] These are the subtle content based regulations where the law focuses on the function or purpose of the speech rather than its content.[192] And Judge Sykes pointed out that the regulation in *Hill*, as well as the Chicago Ordinance, cannot survive this test because the plain text of each focuses on speech undertaken "*for the purpose* of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling."[193] Moreover, not only do these laws fall directly under *Reed*'s subtle category of content based regulation, they also require evaluation of the content of the speech to determine if a violation occurred.[194] And as *McCullen* explained, examining the content of the speech to determine if a violation occurred means that a law is content based.[195]

The Seventh Circuit next evaluated the governmental interest stated in *Hill*.[196] In *Hill*, the Court upheld the law partly because it agreed that "protecting listeners from unwanted communication" and protecting the right to be "let alone," are valid governmental interests.[197] Yet, in *McCullen*, Justice Roberts noted that the law would be content based if "it were concerned with undesirable effects that

[189] *McCullen*, 573 U.S. at 479 (quoting CC v. League of Women Voters of Cal., 468 U.S. 364, 383 (1984)).

[190] *Reed*, 135 S. Ct. at 2230.

[191] *Price*, 915 F.3d at 1118.

[192] *Reed*, 135 S. Ct. at 2227; *Price*, 915 F.3d at 1118.

[193] CHI., ILL., CODE § 8-4-010(j)(1) (emphasis added); see also Hill, 530 U.S. at 707.

[194] *Price*, 915 F.3d at 1118.

[195] *Id.*; *McCullen*, 573 U.S. at 479.

[196] *Price*, 915 F.3d at 1118.

[197] *Hill*, 530 U.S. at 716.

arise from 'the direct impact of speech on its audience' or '[l]isteners' reactions to speech.'"[198]

Lastly, Judge Sykes noted yet another point of tension. In *Hill*, Colorado argued that one of its compelling governmental interests was providing regulation that will be easy to enforce.[199] In upholding the bubble zone regulation, the Court approved that interest, explaining that laws that offer clear guidance to law enforcement promote equal enforcement of the law.[200] Indeed, *Hill* stated that a "brightline prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself."[201] This is in stark contrast with *McCullen*'s explanation that a "painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency."[202]

Recognizing that it is bound by *Hill*, the Seventh Circuit grudgingly affirmed the Chicago Ordinance as a content neutral regulation of time, manner, and place of speech that is narrowly tailored to achieve a significant governmental interest. But in its analysis, the court provided an avenue for the Supreme Court to clarify the validity of *Hill* post *McCullen* and *Reed*. Or perhaps even created a vehicle for the Court to overrule *Hill* and clarify the proper test for abortion clinic bubble and buffer zones—which on their face are content based.

THE SUPREME COURT SHOULD FIND THAT ABORTION CLINIC BUBBLE AND BUFFER ZONES ARE CONTENT BASED REGULATIONS SUBJECT TO STRICT SCRUTINY

The Seventh Circuit correctly recognized the tension between *Hill* and the Court's subsequent First Amendment jurisprudence in *McCullen* and *Reed*. Tension, that when properly explored,

198 *McCullen*, 573 U.S. at 481 (citing *Boos*, 485 U.S. at 321).
199 *Hill*, 530 U.S. at 715-16.
200 *Id.*
201 *Id.* at 729.
202 *McCullen*, 573 U.S. at 495.

undermines the Court's reasoning in *Hill*, and properly questions the current precedent which holds that abortion bubble and buffer zone are content neutral regulations. From *Madsen* until *McCullen*, the Court had gone to great lengths to find those laws to be content neutral, when in fact, they are anything but that. The Court maintained its consistency in the context of abortion clinic bubble zones. But the Court's decision in *Reed* undermines the basic rationale that led the Court to deem the bubble zone regulation to be content neutral in the first place. Whether intentional or not, *Reed* clarified the *Ward* framework, eroding the very foundation of *Madsen, Schenck, Hill*, and *McCullen*. The Seventh Circuit's analysis of the tension between *Reed*, *McCullen*, and *Hill* recognizes the correct test to be applied when determining the content neutrality of a statute. The statute should be tested for content neutrality by asking if it: 1) discriminates based on content on its face; 2) discriminates based on the function or purpose of speech; and 3) can be justified without reference to the content of the speech. Applying this correct test to abortion clinic buffer and bubble zone regulations should result in finding that those regulations are content based and thus subject to strict scrutiny.

Abortion Clinic Bubble Zone Laws Are Content Based

Although *Madsen*, and its progeny, hold that abortion clinic bubble and buffer zones are content neutral, this conclusion is wrong. For starters, the law in *Hill* was plainly content based. The law prohibited approaching a patient of a healthcare facility, if the approach is "for the purpose of . . . engaging in oral protest, education, or counseling . . . ."[203] As the Seventh Circuit noted, by regulating speech defined by its function or purpose, such laws fall squarely under the subtle content based regulation defined in *Reed*.[204] To be sure, the Colorado legislature specifically avoided any reference to the topic of abortion, and instead drafted a broad prohibition on speech

[203] *Hill*, 530 U.S. at 707, n.1.
[204] *Price*, 915 F.3d at 1118.

outside of healthcare facilities generally.[205] But, as the majority in *Hill* correctly noted, the law was motivated by protests outside of abortion clinics.[206] The legislative history is especially telling.[207] The law's sponsor introduced it by saying that "all Colorado women have the right to reproductive choice . . . [but] anti-abortion groups are picketing women's health clinics across the state and are trying to intimidate or physically block all people's entry into these clinics . . . ."[208] And when the bill was signed into law, the sponsor referred to the law as "the only significant pro-choice bill to pass in Colorado since 1967."[209]

Furthermore, the law is also content based on its face. The preamble to the law states, in part, that "the exercise of a person's right to protest or counsel *against* certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner . . . ."[210] As Justice Scalia argued in his dissent, "[t]he word 'against' reveals the legislature's desire to restrict discourse on one side of the issue regarding 'certain medical procedures.'"[211] Yet, the majority concluded that the law was content neutral. Despite legislative history, which indicates that the only driving force behind this statue was concern over protests outside of abortion clinics, and the very text of the statute, which expressed

[205] *See* Alan Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 52 (2003) (discussing the evolution of the overbreadth doctrine which pressures legislators to draft overbroad regulation in order to avoid the impression of viewpoint or content based discrimination).

[206] *Hill*, 530 U.S. at 715 ("the legislative history makes it clear that its enactment was primarily motivated by activities in the vicinity of abortion clinics.").

[207] Chen, *supra* note 205 at 51-55.

[208] *Id.* at 51 (citing the Joint Appendix in *Hill*).

[209] *Abortion Clinic "Bubble" Bill Signed*, COLO. SPRINGS GAZETTE TELEGRAPH, Apr. 20, 1993, at B4.

[210] *Hill*, 530 U.S. at 707, n.1; COLO. REV. STAT. § 18-9-122(1) (1999) (emphasis added).

[211] *Hill*, 530 U.S. at 768-69 (Scalia, J. dissenting).

concern over the discourse on only one side of the issue, the Court found the law to be content neutral.

As the Seventh Circuit correctly noted, the Court's content neutrality analysis was flawed. The Court only asked whether the law can be justified without reference to the content of the regulated speech.[212] But, this is only part of the inquiry. The majority in *Hill* cited to *Ward* for its content neutrality test. The Court in *Ward* upheld a New York City regulation which limited amplified sound from one of the city's public venues.[213] The Court noted that the regulation has nothing to do with content and that "[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[214] A decade later, *Hill* relied on this statement in *Ward* in conducting its content neutrality analysis. However, what *Ward* described as the *principal* inquiry in deciding content neutrality, the Court in *Hill* took as the *only* inquiry.

Similarly, other abortion clinic buffer and bubble zone regulations are also content based. For example, in *McCullen*, although the Court concluded that the law was content neutral, the law on its face appears to be content based. First of all, the Act was entitled, "Protesting and Educating in the Vicinity of Reproductive Health Care Facilities Restricted."[215] The title alone gives away the clear goal and purpose of the law—to regulate *protesting* and *educating* outside of abortion clinics. The Act defined "reproductive health care facilities" as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed," otherwise known as an abortion clinic.[216] No one could seriously argue that there are any protests outside of abortion clinics that are not related to the topic of abortion.

[212] *Id.* at 719; Price, 915 F.3d at 1117.
[213] *Ward*, 491 U.S. at 803.
[214] *Id.* at 791.
[215] MASS. GEN. LAWS, ch. 266, § 120E1/2(b) (West 2007).
[216] *Id.* § 120E1/2(a).

Thus, the title of the Act alone shows its focus on the content of the speech.

Additionally, the law applied only during the clinic's business hours, further illustrating that the legislature was not concerned with content neutral goals such as regulating noise, but rather sought to stymie anti-abortion protestors. That goal is anything but content neutral, meaning that the law created to pursue that goal, the buffer zone, is also anything but content neutral.

The Chicago Ordinance at issue in *Price* suffers the same fatal flaw. The law was styled after *Hill*, which after applying the correct analysis, is content based. The Chicago Ordinance is also content based because it defines speech based on its purpose and function. Like the Colorado statute, the Chicago Ordinance prohibits approaching within eight feet of a patient of an abortion clinic "for the *purpose* of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling."[217] Again, under the clarified test from *Reed*, a law that regulates speech based on its function or purpose is content based.[218] The Chicago Ordinance explicitly targets speech undertaken for a specific "purpose," and is therefore content based.

The Court Correctly Recognized Content Based Regulation in Other Contexts

The Supreme Court's reluctance to find that abortion clinic buffer and bubble zones are content based is a notable deviation from its traditional First Amendment jurisprudence. In other contexts, the Court has been rather critical of plainly content based regulation. In *R. A. V. v. St. Paul*, the Court struck down a municipal law prohibiting certain acts and symbols which are known to "arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[219] The Court unanimously concluded that such a law, while

[217] CHI., ILL., CODE § 8-4-010(j)(1) (emphasis added).

[218] *Reed*, 135 S. Ct. at 2227.

[219] 505 U.S. 377, 379-80 (1992).

well meaning, is an impermissible content based restriction.[220] Beginning its content based analysis with looking at the face of the statute, the Court found that the statute is content based on its face because it prohibits only those fighting words that arouse anger "on the basis of race, color, creed, religion or gender," while allowing fighting words that arouse anger on some other basis.[221] The Court explained that "[t]he First Amendment does not permit [imposing] special prohibitions on those speakers who express views on disfavored subjects."[222] But the Court went even further, noting that this regulation discriminates not only based on content, but also based on viewpoint.[223] That is because the law would permit those arguing for race equality to use fighting words, while prohibiting those arguing against it from using the same fighting words.[224] The Court concluded that "[the government] has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."[225]

In *Sorrell v. IMS Health Inc.*, the Court found that a Vermont statute prohibiting pharmaceutical sales representatives from using a physician's prescription history for marketing purposes was a content based regulation.[226] Here, the Court also began its analysis by looking at the face of the statute and found it to be content based because it

[220] *Id.* at 391.

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] *Id.* at 391-92 ("In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination. Displays containing some words -- odious racial epithets, for example -- would be prohibited to proponents of all views. But 'fighting words' that do not themselves invoke race, color, creed, religion, or gender -- aspersions upon a person's mother, for example -- would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents. One could hold up a sign saying, for example, that all 'anti-Catholic bigots' are misbegotten; but not that all 'papists' are, for that would insult and provoke violence 'on the basis of religion.'")

[225] *Id.*

[226] 564 U.S. 552, 563-64 (2011).

prohibited use of a certain kind of speech (a physician' prescription history) for a specific purpose (marketing), while allowing the use of the same speech for other purposes.[227] The Court also found that the statute discriminated based on a speaker's identity because it only prohibited pharmaceutical sales representatives from using this kind of speech, while everyone else was allowed to use it.[228] Therefore, because the law, on its face, targeted speech taken for a certain purpose—marketing—the statute was content based. [229] The Court also looked to legislative history to bolster its conclusion, noting that "[f]ormal legislative findings accompanying [the statute] confirm that the law's express purpose and practical effect are to diminish the effectiveness of marketing by manufacturers of brand-name drugs."[230]

Likewise, in *United States v. Playboy Entertainment Group*, the Court concluded, albeit in a much more contested manner than *R. A. V.*, splitting 5-4, that a regulation which required adult content to be scrambled or aired during certain, limited hours, is an improper content based regulation.[231] The Court concluded that because the regulation's primary concern is the effect of adult material on youth, its justification is explicitly tied to its content and the therefore the law is content based.[232] The Court recognized the government's concern over youth having access to adult material on television.[233] However, the Court explained that, "[w]here the designed benefit of a content based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists."[234] In no unequivocal terms, the Court explained that the First Amendment's prohibition on content based discrimination trumps the government's concern over the impact of

[227] *Id.*
[228] *Id.*
[229] *Id.*
[230] *Id.* at 564-65.
[231] 529 U.S. 803, 811 (2000).
[232] *Id.* at 811.
[233] *Id.* at 813-14.
[234] *Id.* at 813.

that content on the listener.[235] Indeed, few people would disagree with the policy that youth should be shielded from adult content, yet the Court explained that the effect of the speech will not transform a plainly content based regulation into a content neutral one.[236] Notably, the Court decided *Playboy* a month before *Hill*, and Justice Stevens, who authored the majority opinion in *Hill*, joined the majority in *Playboy*, indicating that he thought this analysis was correct. Yet, a month later, the Court did not follow its own analysis.

And finally, most recently, in *Reed*, the Court did not hesitate to call a law regulating use of signs content based on its face.[237] As explained above, the Court began its analysis with the text of the statute and concluded that the law is content based because it defined the regulated signs based on the content of the information the sign conveys.[238] The Court then explained that a "law . . . is content based on its face . . . regardless of the government's benign motive, content neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."[239]

The Court has never before hesitated to call a law which regulates speech based on its content, exactly what it is—a content based regulation. Despite the morally right purpose that the law may serve, such as the anti-racially and religiously charged hate speech in *R. A. V.*, or the desire to protect youth from pornographic materials in *Playboy*, the Court adhered to its analytical framework. That framework is to first look at the text of the statute to determine if the law discriminates based on the content of speech. If the government seeks to root out some evil, vile, or plain wrong conduct, but does so only for a limited group of people because of its disagreement with that group's viewpoint, the regulation is content based.[240] This was true in *R. A. V.*

[235] *Id.*

[236] *Id.*

[237] 135 S. Ct. at 2227.

[238] *Id.*

[239] *Id.* at 2228.

[240] And such regulation is likely also view-point based. *See R.A.V.*, 505 U.S. at 391.

where the government prohibited the use of symbols or acts meant to invoke anger based on race or religion, a righteous goal, but allowed use of the same symbols or acts to invoke anger that is based in some reason other than race or religion.

A similar problem appeared in *Sorrell*. The State wanted to prevent pharmaceutical companies from directly targeting physicians which could undermine their medical decisions. To achieve this righteous goal, the state prohibited a certain class of speakers—pharmaceuticals sales representatives—from using certain speech for a specific purpose—prescription history for the purpose of marketing. By focusing on the intent of the speaker, the State targeted a sub-part of the entire class of speakers and imposed a burden on that group. Just as in *R. A. V.*, the regulation in *Sorrell* was content based on its face and the Court did not have a hard time reaching that conclusion. *R. A. V.* was a unanimous decision, and in *Sorrell*, the three dissenters did not raise issue with the Court's content based analysis.[241]

Likewise, in *Playboy*, the government wished to protect youth from adult video content, again a righteous goal, by requiring those that primarily stream such content to either scramble their signal or limit it to overnight only. Congress sought to achieve this goal by targeting specific content—sexually oriented programming—and a specific class of speakers—those that primarily distribute such content. And again, the Court correctly found that regulating certain speech based on its content makes the law content based. The same conclusion appears in *Reed*. The Court did not quibble about whether a statute that separates signs into categories based only on the message it conveys is a content based regulation. In a unanimous decision, the Court concluded, "[o]n its face, the Sign Code is a content based regulation of speech. We thus have no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny."[242]

[241] Rather, they argued that regulation should be subjected to lesser scrutiny as it affects commercial speech only. *See Sorrell*, 564 U.S. at 581 (Stevens, J. dissenting).

[242] *Reed*, 135 S. Ct. at 2227.

These four cases illustrate a common principle: the Court knows how to determine if a regulation is content based. That determination starts with the text. If a regulation defines the speech by the message conveyed, like in *Reed* or *Playboy*, the Court will find it content based on its face. However, the law does not need to be as explicitly content based in order to receive strict scrutiny, because the Court will also look to the purpose or function of that speech. And just like in *Sorrell* and *R. A. V.*, where the regulation prohibited speech taken for a specific purpose, such as marketing or invoking racially- or religiously-based anger, the Court will also find it to be content based. Finally, the Court will also look to the legislative history and purpose of the law. This played an especially important role in *Sorrell*, where the Court found content bias in the text, but still looked to legislative history and found specific language from the legislature showing intent to discriminate against one subgroup—pharmaceutical marketers.

This analytical framework guides the Court in determining whether a statute is content neutral. This is true regardless of how righteous or morally correct the purpose of the law is. Whether it's preventing hate crime, shielding youth from obscene content, or ensuring the best medical care, the law will still be content based. Meaning, the purpose or justification for the law has no bearing on whether it is content based. To be sure, the law's purpose or justification is of great importance when deciding if the law survives the required scrutiny. But the law's purpose plays no role in deciding which level of scrutiny applies.

Hill's Analysis Was Outcome Driven

The reason why the Court in *Hill* departed from its traditional content neutrality analysis lies in the context of abortion clinic buffer and bubble zone laws. Those laws impact the ability of abortion protestors to express their view on abortion. A view that runs contrary to the current laws in the United States, which recognize a fundamental right in access to abortion. Therefore, because of the

sensitive nature of the underlying debate—whether abortions should be allowed or not—the Court appears to have applied an altered content neutrality analysis to the plainly content based laws. This then allowed the Court to find those laws to be content neutral and thus subject to lower scrutiny, ensuring that at least some portions of those laws survive. And this is exactly what Justice Scalia called out in his dissent in *Hill*, stating,

> None of these remarkable conclusions should come as a surprise. What is before us, after all, is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the "ad hoc nullification machine" that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice.[243]

Justice Scalia referred to anti-abortion protesting as a "highly favored practice" and accused the majority of creating the "ad hoc nullification machine," which allows the Court to uphold laws which limit this "favored practice." Put otherwise, Justice Scalia accused the majority of creating a different constitutional test that is applied only to regulations that limit the ability of people to protest *against* abortions. Soon after the decision was published, scholars recognized that *Hill*'s content neutrality analysis was modified, and indeed flawed.[244]

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[243] *Hill*, 530 U.S. at 741 (Scalia, J. dissenting).

[244] *See* David B. Cruz, *"Just Don't Call it Marriage": The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 993 n.361 (2001)

> The dissents in Hill appear to have it right. The majority's first supposed reason for treating the Colorado statute as content neutral is so patently inadequate as to call into question the majority's entire treatment of the issue . . . The majority's test really only determines whether the statute is a "place" regulation (and thus a "time, place, or manner" regulation); just because it is does not mean that it cannot be content based. The majority's test would be an adequate reason for inferring content neutrality only if a law's

The critics of *Hill*'s content neutrality analysis largely agree that Colorado's statute was content based. First, the law's preamble on its face singled out specific speech—protest against certain medical procedures (read: abortions). Yet the Court found it to be content neutral. The law also explicitly described the regulated speech in terms of its purpose and function, prohibiting only that speech which is taken for the purpose of "oral protest, education, or counseling." Yet the Court found it to be content neutral. Then, the Court merely disregarded the legislative history, despite its precedent which requires the Court to look to legislative history to determine proper intent even if the statue is content neutral on its face.[245] Had the Court engaged in

> content neutrality and its being a time-place-manner regulation were equivalent. But, as the dissent properly notes, they are not.
>
> Second, even if Colorado's statute was not adopted because of disagreement with the message of abortion protesters, disagreement with the expression of that message to women about to undergo abortions clearly undergirds the statute. Even if the Colorado Supreme Court's holding that the statute applies to "all demonstrators" is taken not to raise any due process concerns despite the statute's being addressed only to "oral protest, education, or counseling," it still skews the expressive landscape (or lawscape) with respect to abortion: A person who wishes to escort a woman into a clinic in order to support her decision to have an abortion would not be a "demonstrator," and it is implausible that police would be equipped to prosecute any clinic escorts who might utter reassurances to a woman that technically might fall within the statute's definition of "counseling." A person who wishes to dissuade a woman from having an abortion, on the other hand, is forbidden to approach to "counsel" without permission.
>
> Third, the majority essentially reduced the content neutrality inquiry solely to the question whether the challenged regulation is related to the suppression or content of expression, over the dissenters' cogent protestation that this is only the "principal inquiry."

[245] *Cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993) (holding that, under the First Amendment's Free Exercise Clause,

a proper statutory interpretation of the Colorado law, it would have quickly found ill-intent.

The legislative history is riddled with hints of bias against abortion protestors.[246] To be fair, the Court did not just completely refuse to discuss legislative history. In fact, the majority noted that "the legislative history makes it clear that its enactment was primarily motivated by activities in the vicinity of abortion clinics."[247] Indeed, the law's sponsor referred to it as a "the only significant pro-choice bill to pass in Colorado since 1967."[248] Yet, the Court found it to be content neutral, refusing to read this motive as giving the statute an improper purpose. Finally, looking past the statutory text and legislative history, above all, the Court reduced the content neutrality to one singular inquiry: whether the challenged regulation is related to the suppression or content of expression.[249] But, as the dissent correctly pointed out, while this is the "the principal inquiry . . . it is not the only inquiry."[250] Still, the majority, relying on *Schenck* and *Madsen*, which dealt with injunctions rather than statutes, folded the entire content neutrality analysis into this one inquiry. An inquiry, which after *Reed*, we know is incomplete. Simply put, *Hill*'s content based analysis marks a significant departure from the Court's traditional content based analysis. The reason for this appears to be that the majority's reasoning was outcome driven: the Court wanted to ensure that the laws limiting speech outside of abortion clinics survive, thus the Court went to great length to call it content neutral and subject to intermediate scrutiny, rather than strict scrutiny.

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the Court could look beyond a law's facial neutrality to examine the discriminatory purpose of the law).

[246] For an in-depth discussion of the legislative history, *see* Chen, supra note 205 at 51-55.

[247] *Hill*, 530 U.S. at 715.

[248] *Abortion Clinic "Bubble" Bill Signed*, COLO. SPRINGS GAZETTE TELEGRAPH, Apr. 20, 1993, at B4.

[249] *Hill*, 530 U.S. at 719 (quoting *Ward*, 491 U.S. at 791); s*ee also* Cruz, *supra* note 244 at 993 n.361.

[250] *Hill*, 530 U.S. at 746 (Scalia, J. dissenting) (internal quotations omitted).

The Future of Abortion Clinic Buffer and Bubble Zones

The Court does not need to go through the legal gymnastics required to squeeze the abortion clinic bubble and buffer zone laws into intermediate scrutiny. While it is less demanding than strict scrutiny, abortion clinic buffer and bubble zones likely can survive strict scrutiny. Narrow tailoring is beyond the scope of this article, but if the Court properly recognizes those laws to be content based, then those laws would need to be narrowly tailored toward a *compelling* governmental interest, rather than a *significant* interest required under intermediate scrutiny. And the Court has provided enough guidance to shed some light on this question. Albeit writing in the context of intermediate scrutiny, the Court has signaled that the greater the interest pursued by these bubble and buffer zones, the greater physical distance that Court is willing to uphold.

To understand the tailoring implications, it makes most sense to discuss bubble zones separately from buffer zones. Looking at bubble zones, in *Madsen*, the Court struck down the prohibition on approaching patients that are within 300 feet of a clinic. [251] The injunction in that case actually did not prohibit approaching within certain number of feet, but generally prohibited "physically approaching" patients.[252] Had the law survived, a better definition of approach would be needed, but for purposes of this discussion we will assume that "physically approaching" meant approaching from a distance greater than eight feet, perhaps merely taking some steps toward that patient from as far away as ten or fifteen feet.[253] Under

[251] *Madsen*, 512 U.S. at 769-70, 773-74.

[252] *Id.* at 760-61.

[253] This is a reasonable assumption given that the Court in *Hill* upheld an eight-foot bubble zone, but in *Schenck*, the Court explicitly left open the question of whether any distance between the patient and the protestor can survive constitutional scrutiny. Therefore, for the purposes of this discussion, it is reasonable to assume that in *Madsen*, which came before *Schenck* and *Hill*, "approaching" could have included merely taking steps toward the patient from a distance beyond eight feet. If it were eight feet, or smaller, then we already know that this would likely survive.

such definition, we know that this law would fail strict scrutiny since it failed intermediate scrutiny in *Madsen*.

Next, in *Schenck*, the Court dealt with a more precise injunction, which prohibited approaching within fifteen feet of a patient.[254] Like in *Madsen*, this bubble zone was struck down as not being narrowly tailored. But, at the same time, the Court upheld a fifteen-foot buffer zone around the clinic's entrance.[255] This signals that the Court will require a closer fit, or a small radius, for bubble zones, than buffer zones. And since the Court in *Hill* thought that an eight-foot bubble survived intermediate scrutiny, it logically follows that to survive the heightened requirement of strict scrutiny, the law will likely need to be slightly more closely tailored. Finally, the Court left yet another clue for the tailoring task, noting that a floating bubble that requires people to get out of the way, as was the case in *Schenck*, is more restrictive than a floating bubble that allows protestors to remain stationary, as was the case in *Hill*.[256]

Thus, we have a sliding scale. A general restriction on "physically approaching" is not narrowly tailored. Neither is a fifteen-foot floating bubble. But an eight-foot bubble that allows a person to remain stationary is narrowly tailored. Now, this sliding scale exists under intermediate scrutiny, meaning that the Court thought eight feet was narrowly tailored to achieve a significant governmental interest. If the Court properly recognizes bubble and buffer zones as content based, then the required interest would have to be compelling, rather than significant.

There exists a serious question as to whether the Court will accept the same interests that the Court previously found significant—ensuring access and preventing patients and staff from being "stalked or shadowed"[257]—as also being compelling. Indeed, the Seventh Circuit correctly pointed out that some of the interests that the *Hill* Court relied on—"protecting listeners from unwanted communication"

[254] *Schenck*, 519 U.S. at 367.

[255] *Id.* at 376-77.

[256] *Hill*, 530 U.S. at 727.

[257] *Madsen*, 512 U.S. at 773-74 (internal quotations omitted)

and protecting the right to be "let alone"—are not likely to be found valid after *McCullen*. [258] But, even if they are found to be valid, because of the more exacting nature of strict scrutiny, the distance upheld under intermediate scrutiny will probably need to be adjusted. Therefore, while an eight-foot bubble may be narrowly tailored to pursue a significant governmental interest (intermediate scrutiny), the distance may have to be smaller to be narrowly tailored to pursue a compelling governmental (strict scrutiny). How much more narrowly remains to be seen.

Turning to the buffer zones, that analysis here is simpler. The Court has evaluated buffer zones in the context of both injunctions and generally applicable laws. Looking to injunctions first, the Court has previously upheld a fifteen-foot injunction buffer zone in *Schenck* and a thirty-six-foot injunction buffer zone in *Madsen*. [259] But, in *McCullen*, the Court struck down a generally applicable thirty-five-foot buffer. [260] This illustrates the principle that injunctions, by their very own nature, are more narrowly tailored than generally applicable laws. Therefore, when it comes to injunctions, again, under intermediate scrutiny, up to thirty-six feet is okay. Assuming that the interests that the Court found to be significant—"public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways"[261]—are also compelling (an easier assumption then with regard to bubble zones) it is likely that similar, if not that same, buffer zones would survive. Since strict scrutiny is more exacting, the Court may demand a closer fit here, which would reduce the buffer zone to somewhere between thirty-six and fifteen feet.

Turning to generally applicable laws, however, poses a harder question. The only case to address generally applicable buffer zone was *McCullen*, and it struck down the thirty-five-foot buffer zone. So here we simply do not have much indication from the Court as to what distance, if any, may survive constitutional scrutiny.

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[258] *Price*, 915 F.3d at 1118.

[259] *Schenck*, 519 U.S. at 376-77; *Madsen*, 512 U.S. at 769-70, 773-74.

[260] *McCullen*, 573 U.S. at 497.

[261] *Id.* at 486.

CONCLUSION

Bubble and buffer zones around healthcare facilities are content based regulations. Yet, the Supreme Court has repeatedly found them to be content neutral. The result is that these laws, which are aimed at limiting anti-abortion protestors' First Amendment protections, only need to be narrowly tailored to achieve a *significant* governmental interest. This comes at a cost. The cost being that the Court has created a separate content-neutrality test applicable only to abortion clinic buffer and bubble zone laws. Under this test, a law is content based only if it cannot be justified without reference to the content of the speech. If the Court's goal is to ensure that the anti-abortion protests do not escalate to dangerous levels, there is another way to achieve that result. Correctly recognizing that abortion clinic bubble and buffer zones are content based would mean that they are subject to strict scrutiny. But, that does not have to be the fatal blow to these well-intentioned regulations.